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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

COMMENTS OF GTE

GTE Service Corporation on
behalf of GTE's telephone and
wireless operating companies

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August 9, 1994

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SUMMARY

GTE Service Corporation ("GTE") addresses in these comments the Commission's Second Further Notice of Proposed Rule Making ("*Second Further Notice*") seeking comment as to whether management agreements, resale agreements, and joint marketing agreements should be treated as attributable interests for purposes of applying the 40 MHz PCS spectrum aggregation limit, the PCS-cellular cross-ownership rules, or any general CMRS spectrum cap the Commission may adopt.

GTE strongly believes, as discussed in detail in its comments filed in response to the Further Notice of Proposed Rule Making previously adopted in this docket, that the adoption of the Commission's proposal to place a cap on the amount of commercial mobile radio service ("CMRS") spectrum that individual licensees are allowed to aggregate would undermine the development of competition in the CMRS marketplace as well as the successful evolution of new CMRS services and technologies.[1] Accordingly, GTE opposes the CMRS spectrum cap proposal advanced by the Commission in that phase of the proceeding, and reiterates it view that the proposal should be abandoned.

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1 *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 94-115 (May 20, 1994); Comments of GTE, GN Docket No. 93-252 (filed June 20, 1994).

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COMMENTS OF GTE

GTE Service Corporation ("GTE"), on behalf of GTE's telephone and wireless operating companies, hereby submits these comments in response to the Second Further Notice of Proposed Rule Making adopted by the Commission in the above-captioned docket on July 18, 1994.[1]

I. INTRODUCTION

GTE is a leading provider of wireless telecommunications services, with offerings including cellular, satellite, and other mobile radio services such as Airfone and Railfone. In addition, GTE's domestic telephone companies participate in the mobile services marketplace by providing paging services, and by interconnecting with cellular and other wireless facilities.

Throughout the course of this docket, GTE has consistently supported the efforts of Congress and the Commission to establish a regulatory framework capable of ensuring the symmetrical treatment of competing mobile service providers, and of

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1 Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 94-191 (released July 20, 1994) (Second Further Notice of Proposed Rule Making) [hereinafter *Second Further Notice*].

promoting competition, diversity, and economic growth in the mobile services marketplace. Similarly, GTE supported the formulation of rules applicable to personal communications services ("PCS") that will maximize competition among established mobile service providers and create competitive entry opportunities for the introduction of new services.

Consistent with those viewpoints, GTE has opposed the proposal to adopt a blanket limitation on the level of commercial mobile radio service ("CMRS") spectrum that any one entity may hold.[2] Similarly, in these comments, GTE generally opposes attributing non-equity arrangements for purposes of the broadband PCS spectrum limit, the PCS-cellular cross-ownership rules, or any general spectrum aggregation cap.

II. GTE CONTINUES TO BELIEVE THAT THE PUBLIC INTEREST WOULD NOT BE SERVED BY THE ADOPTION OF A CAP ON THE AMOUNT OF CMRS SPECTRUM THAT LICENSEES MAY AGGREGATE IN A GIVEN GEOGRAPHIC AREA

In the *Further Notice* adopted earlier in this docket, the Commission tentatively proposed to adopt a 40 MHz CMRS spectrum aggregation limit, adjusted upward to allow licensees to offer both broadband and narrowband services.[3] The Commission also tentatively proposed to attribute all CMRS ownership interests of five percent or more in applying the CMRS spectrum cap.[4]

As discussed in detail in its comments filed earlier in this docket, GTE strongly opposes the Commission's CMRS spectrum cap proposals.[5] Initially, although GTE

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2 *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 94-100 (May 20, 1994) [hereinafter *Further Notice*]; Comments of GTE, GN Docket No. 93-252 (filed June 20, 1994) [hereinafter *Comments of GTE*].

3 *Further Notice* ¶ 93.

4 *Id.* ¶ 101.

5 *Comments of GTE* at 18.

does not oppose the application of a spectrum cap to broadband PCS spectrum, the record contains no basis for extending the service-specific, broadband PCS spectrum aggregation limit to the accumulation of CMRS spectrum generally. Significantly, the Commission's proposal to impose an overall 40 MHz limit CMRS spectrum aggregation limit is not premised on a detailed analysis similar to that upon which the 40 MHz broadband PCS spectrum aggregation limit is based.[6] Quite to the contrary, the fact that a 40 MHz limit has been found appropriate for broadband PCS, a single CMRS offering, indicates that, in view of the extensive number of services classified as CMRS, an overall 40 MHz spectrum cap is clearly too restrictive.

Similarly, the Commission has not established that a five percent attribution rule is appropriate for use in applying an across-the-board CMRS spectrum cap. First, as articulated in GTE's comments responding to the Commission's proposal, the use of a five percent general CMRS spectrum attribution standard conflicts with the Commission's decision in the PCS context. There, the Commission decided to apply a five percent attribution rule where the aggregation of spectrum in a single service — either broadband or narrowband PCS — is at issue, and a more liberal 20 percent rule where cellular-PCS cross-ownership is involved.[7] The effect of a blanket five percent

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6 *See* Amendment of the Commission's Rules To Establish New Personal Communications Services, 8 FCC Rcd 7700, 7728-29 (1993) (Second Report and Order) [hereinafter *Broadband PCS Second Report and Order*], *recon.*, Amendment of the Commission's Rules To Establish New Personal Communications Services, FCC 94-144 (June 13, 1994).

7 *See Comments of GTE* at 20. Under the broadband PCS rules, a five percent attribution rule is used where an individual licensee's aggregation of broadband PCS spectrum is at issue. A more liberal 20 percent attribution rule is used where cellular/PCS cross-ownership is concerned. *See Broadband PCS Second Report and Order*, 8 FCC Rcd at 7728, 7745. A five percent attribution rule is also used in applying the narrowband PCS rules, which prohibit a single entity from holding more than three 50 kHz channels, paired or unpaired, in any geographic area. *See* Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services, 8 FCC Rcd 7162, 7168 (1993)

CMRS attribution rule would be to bar an entity with certain cellular interests from participation in various CMRS services when such participation would otherwise be permitted under the cellular-PCS cross-ownership rules. Furthermore, the use of a five percent attribution rule in conjunction with an across-the-board CMRS spectrum aggregation limit is extremely restraining, and will chill participation in new services by minority investors — a source of capital crucial to the successful implementation of most new offerings.[8]

Moreover, as explained in GTE's earlier-filed comments, the imposition of an overall CMRS spectrum aggregation limit is unnecessary, and would be counter-productive to both the development of effective competition in the CMRS marketplace and the offering of services consistent with the public interest. For example, the Commission's PCS rules already significantly limit a licensee's ability to aggregate CMRS spectrum. Similarly, both the amount of available CMRS spectrum and the construction and placed-in-operation requirements contained in specific CMRS service rules already ensure that no entity may hoard spectrum in order to disadvantage its competitors.[9]

(First Report and Order), *recon.*, 9 FCC Rcd 1309 (1994) (Memorandum Opinion and Order).

8 On July 25, 1994, GTE made an *ex parte* presentation before certain members of the Commission staff, explaining the restrictiveness of a five percent attribution rule as put in practice. A cellular company with a 12 percent minority cellular position within an MTA, and with no other cellular properties, is eligible under the Commission's PCS rules to purchase a single 10 MHz PCS license. If in the year 1999, a new wireless service is established or a failed PCS licensee in the MTA is seeking a buyer, the cellular company would be ineligible to participate in either offering. Because the company has more than five percent of the cellular license, it will be imputed with 25 MHz of cellular spectrum. This, plus the 10 MHz of PCS spectrum, renders the company ineligible to purchase any 10 MHz spectrum block. *See* Letter from Carol L. Bjelland, GTE Service Corporation to William Caton, Acting Secretary, Federal Communications Commission (July 22, 1994) (concerning *ex parte* presentation).

9 *Comments of GTE* at 18-19.

In addition, almost unanimously, the commenters responding to the Commission's spectrum cap proposal agree that the imposition of a general CMRS spectrum aggregation limit will injure the public interest by unfairly restricting existing licensees from participating in new CMRS technologies and spectrum allocations. As discussed in GTE's comments, this in turn will deprive the public of the benefits brought by existing operators to new services and technologies as the result of their expertise and economies of scope.[10] GTE does not believe that it was, or is, the Commission's intent to place potential qualification restrictions on future CMRS offerings that are yet to be invented.

Finally, GTE notes that both the Commission's general CMRS spectrum cap proposal and its proposal to treat non-equity arrangements as attributable interests in applying spectrum aggregation limits appear to be based on the presumption that licensees, applicants, and their affiliates are inclined toward anticompetitive behavior in the CMRS marketplace. This assumption instead should be reversed to start with the presumption that an entity is innocent and will act in a manner consistent with regulatory policies until that entity indicates or acts otherwise. Existing antitrust laws are available as an avenue of recourse in the event of anticompetitive behavior in CMRS offerings, and other safeguards may be utilized as well. In view of the adverse consequences likely to result from the use of an overly broad spectrum aggregation cap and unnecessarily restrictive attribution rules, GTE believes that these alternative safeguards should instead by relied upon by the Commission.

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10 *Id.* at 19.

III. MANAGEMENT AGREEMENTS SHOULD NOT BE SUBJECT TO ATTRIBUTION UNDER ANY SPECTRUM CAP

In the *Second Further Notice*, the Commission seeks comment on whether the use of management agreements may allow a manager that is also a competitor to have access to market sensitive information, such as the licensee's business plans, customer lists, product and service development plans, or marketing strategies, that could affect the incentive or ability of CMRS licensees to compete, the number of competing providers, or the independence of pricing decisions.[11] In addition, the Commission asks commenters to discuss whether management agreements should be treated as attributable interests in all cases, including the PCS spectrum aggregation cap, the PCS-cellular cross-ownership restrictions, and any overall CMRS spectrum aggregation cap that may be imposed.[12]

In GTE's view, the treatment of management agreements as attributable interests is equally inappropriate in the context of the PCS spectrum aggregation limit, the PCS-cellular cross-ownership rules, or any other more broad CMRS spectrum aggregation cap that may be adopted in the future. Initially, the *Second Further Notice* overlooks the fact that management agreements are likely to play a critical role in ensuring the successful launch of PCS and other services to be offered by small businesses, rural telephone companies, and businesses owned by women and minorities. Many of these "designated entities" lack the resources, expertise, and direct experience necessary to set their operations into place promptly and efficiently. As a result, such licensees are likely to rely heavily on the services of consultants and management companies as they attempt to establish communications systems and initiate service. The adoption of an attribution rule that would by its very nature deter the use of management agreements will in turn unnecessarily reduce the options

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[11] *Second Further Notice* ¶ 6.

[12] *Id.* ¶ 9.

available to designated entities as they attempt to implement their systems. Such a result would thwart the growth and development of communications services owned by the very entities whose successful participation Congress and the Commission have endeavored to ensure.[13]

In addition, certain statements contained in the *Second Further Notice* appear to assume that licensees that take advantage of management services in the operation of their facilities are either unable or unwilling to take appropriate steps to ensure that a management company in their employ will not engage in anticompetitive conduct or activity constituting a breach of the manager's fiduciary duties. Similarly, the *Second Further Notice* reflects a perception that entities providing management services will knowingly expose themselves to charges of conflict of interest and breach of fiduciary duty. Rather than addressing these serious concerns through the indirect method of attribution under a spectrum cap, parties that violate these laws and obligations should be attacked directly through the enforcement of antitrust laws and state fiduciary requirements.

Moreover, although the Commission discusses management agreements as a group, their provisions in fact widely differ, and many arrangements will never present the concerns voiced in the *Second Further Notice.* Rather than treating all management agreements as attributable interests in the spectrum cap context, the Commission can more appropriately address its concerns through the exercise of its broad licensing authority. For example, if an entity that serves as a manager under a management agreement with a cellular operator wishes to acquire a PCS license, the appropriate time for the Commission to examine the terms and ramifications of that management agreement is in the course of reviewing the PCS application. If the

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[13] *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 9 FCC Rcd 2348, 2388-89 (1994) (Second Report and Order).

Commission identifies the likelihood of a problem with the particular entity acting as both manager and licensee, appropriate action — denial of the PCS application or imposition of conditions — can then be taken. By proceeding in this manner and context, the Commission will avoid unduly curbing the usefulness of management agreements, while at the same time affording itself a mechanism by which to curtail conduct that it perceives as being potentially anticompetitive.

Thus, while some management agreements may present valid concerns, a spectrum cap is not the appropriate mechanism for effectively handling those matters. The issues instead should be directly addressed, such as in the manner outlined in these comments.

IV. RESALE AGREEMENTS SHOULD NOT BE SUBJECT TO ATTRIBUTION UNDER ANY SPECTRUM CAP

The Commission also asks commenters to discuss whether resale agreements should be attributed to resellers in applying the PCS spectrum aggregation limit, the PCS-cellular cross-ownership rules, or a general CMRS spectrum cap.[14] The Commission tentatively concludes that the attribution of spectrum to resellers is unnecessary because, as a general rule, resellers cannot exercise effective control over the spectrum over which they provide service. In arriving at this tentative conclusion, the Commission also notes that resellers generally lack the ability to reduce the amount of service provided over such spectrum because other resellers are free to enter into similar arrangements.[15]

GTE agrees with the Commission's tentative determination not to include resale agreements as attributable interests under any type of spectrum aggregation cap. In addition to the fact that resellers generally lack control over the spectrum used under

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14 *Second Further Notice* ¶ 12.

15 *Id.* ¶ 13.

resale arrangements, resale activities can serve as a source of competition in many service and geographic markets. The adoption of rules attributing resale agreements in the application of spectrum aggregation caps could depress the level of competition at the retail level by discouraging participation in resale activities by entities seeking to participate on a facilities basis in the wireless marketplace in overlapping service areas.

V. JOINT MARKETING AGREEMENTS SHOULD NOT BE SUBJECT TO ATTRIBUTION UNDER ANY SPECTRUM CAP

Finally, in the *Second Further Notice*, the Commission acknowledged that joint marketing agreements benefit licensees and consumers because of the savings associated with the pooling of resources for advertising and direct sales.[16] In addition, however, the Commission expressed concern that joint marketing arrangements may allow competitors access to information or have other anticompetitive effects that could impede vigorous competition. Accordingly, the Commission tentatively proposes that, when a licensee enters into a joint marketing venture with one or more licensees whose geographic market areas have an overlap of 10 percent of the population, the interest of the other joint venture licensees should be attributable for purposes of applying the various spectrum aggregation limits applicable to mobile services providers.[17]

In GTE's experience, joint marketing agreements are useful to consumers because they result in savings and promote competition among service providers. Specifically, through the use of joint marketing arrangements, systems (many of them small) that are not commonly owned are able to pool their resources for advertising and other purposes in order to obtain economies in advertising and marketing. Consumers benefit as a result of the both the cost savings and the emergence of effective competition.

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[16] *Id.* ¶ 14.

[17] *Id.* ¶ 16.

Furthermore, each licensee that participates in a joint marketing agreement always remains in control of its own facility. As a result, it is unlikely that such an arrangement would allow a competitor access to information that could be used for anticompetitive purposes. In addition, in GTE's experience, joint marketing-type arrangements can be structured so as to avoid the sharing of information between competitors, thereby obviating the Commission's concerns without the need for a general attribution rule.[18]

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[18] MobiLink is an example of an alliance that provides benefits to consumers and licensees without creating opportunities for anticompetitive abuses. MobiLink, in which GTE and certain affiliates participate, is a voluntary coalition of fifteen cellular service providers that represent over 100 cellular companies and partnerships. MobiLink was created to permit its members to enhance customer services and respond to the rapid evolution of technology and market competition in the cellular industry. Through MobiLink, cellular service is more convenient and accessible to customers, who are provided mobility and consistent service across the geographic area served by MobiLink's participants. In addition, MobiLink has implemented nationwide standards, including a nationwide roaming standard, that are designed to complement existing networks and infrastructure operations throughout the country.

Significantly, MobiLink's carrier coalition does not dictate the business practices of the individual members. Each member determines its own pricing policies and makes its own individual business decisions. Moreover, MobiLink membership in no way implicates the sharing of business records or other information that could raise anticompetitive concerns.

In view of GTE's successful experience with MobiLink, GTE cautions the Commission not to adopt rigid attribution rules applicable to joint marketing and similar arrangements. While there may be some joint marketing arrangements that present valid concerns, the MobiLink coalition instead provides an example of the type of arrangement that is beneficial to both licensees and consumers, and that should not be intentionally or unintentionally restricted by means of attribution under any spectrum cap.

VI. CONCLUSION

For the reasons set forth in detail in the foregoing comments, GTE urges the Commission to abandon the CMRS spectrum cap proposal advanced in an earlier phase of this docket. In addition, because management agreements, resale agreements, and joint marketing agreements play an important role in promoting competition and diversity among CMRS service providers, the Commission should not treat these arrangements as attributable interests for purposes of imposing any spectrum aggregation limit.

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Comments of GTE" have been mailed by first class United States mail, postage prepaid, on the 9th day of August, 1994 to all parties of record.

Ann D. Berkowitz